

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

In the Matter of)
)
 Petition for Rulemaking to Extend the Part 22)
 Cellular Renewal Rules to the Part 24 Personal)
 Communications Service)

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 FEDERAL COMMUNICATIONS COMMISSION
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PETITION FOR RULEMAKING

In accordance with Section 1.401 of the Commission's rules, the Cellular Telecommunications Industry Association ("CTIA"),¹ by its attorneys, hereby petitions the Commission to initiate a rulemaking to make the Personal Communications Service ("PCS") rules dealing with license renewals consistent with those governing the cellular service. A rulemaking is necessary to ensure regulatory parity for similar services and to effectuate the Commission's previous decision to subject PCS to the cellular renewal procedures. Accordingly, CTIA requests that the Commission begin a new rulemaking and propose amending Section 24.16 to cross-reference the cellular renewal rules contained in Sections 22.935 through 22.940.

INTRODUCTION

During 1992 and 1993, the Commission conducted two rulemakings that dealt with renewal procedures. The first proceeding examined in detail the renewal procedures for the cellular service. The second proceeding created the new Personal Communications Service which was intended to compete directly with the cellular service.

¹CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including 48 of the 50 largest cellular and broadband personal communications service ("PCS") providers. CTIA represents more broadband PCS carriers and more cellular carriers than any other trade association.

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In the cellular proceeding, the Commission amended Part 22 to set forth detailed rules governing the cellular license renewal process.² These rules, contained in Sections 22.935-22.940, govern the content of renewal and competing applications for a cellular license, as well as a two-step process for resolving renewal challenges.³ Under the two-step renewal process, a threshold determination is made whether the incumbent renewal applicant deserves a renewal expectancy.⁴ The incumbent is entitled to this expectancy if it has (1) provided “substantial service,”⁵ and (2) substantially complied with applicable Commission rules, policies, and the Communications Act over the license term.⁶ If a renewal expectancy is awarded, competing

²*Amendment of Part 22 of the Commission’s Rules Relating to License Renewals in the Domestic Public Cellular Radio Telecommunications Service*, CC Docket No. 90-358, *Report and Order*, 7 F.C.C.R. 719 (1992) (“*First Cellular Renewal Order*”); *Memorandum Opinion and Order on Reconsideration*, 8 F.C.C.R. 2834 (1993) (“*Cellular Renewal MO&O*”); *Memorandum Opinion and Order on Further Reconsideration*, 9 F.C.C.R. 4487 (1994) (“*Further Reconsideration*”).

³See 47 C.F.R. §§ 22.935, 22.936, 22.937, 22.939, 22.940. The Commission initially rejected the adoption of a two-step renewal procedure as inconsistent with Section 309 of the Communications Act, as interpreted in *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971). *First Cellular Renewal Order*, 7 F.C.C.R. at 725 (*Citizens* held that competing applications for broadcast licenses cannot be dismissed without a hearing). On reconsideration, however, the Commission “carefully reassess[ed] *Citizens*” and stated that it no longer believed that “adoption of the two-step procedure for comparative renewal proceedings . . . is necessarily inconsistent with *Citizens*” for common carrier licenses. *Cellular Renewal MO&O*, 8 F.C.C.R. at 2836. This issue has now been effectively mooted by the Telecommunications Act of 1996 since competing broadcast renewal applications are now prohibited if the incumbent is granted a renewal expectancy. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); H.R. Conf. Rep. No. 104-458, at 164 (1996).

⁴47 C.F.R. § 22.935(c). The rules stipulate that this renewal expectancy will be “the most important factor” in determining whether to award a cellular license to a renewal applicant or challenger. *Id.*; see *Cellular Renewal MO&O*, 8 F.C.C.R. at 2834, 2837-38. The Commission found that the two-step procedure flowed from “the logic of a renewal expectancy.” *First Cellular Renewal Order*, 7 F.C.C.R. at 721-22.

⁵47 C.F.R. § 22.940(a)(1)(i). Pursuant to this section, “‘Substantial’ service is defined as service which is sound, favorable, and substantially above mediocre service. . . .” *Id.*

⁶47 C.F.R. § 22.940(a)(1)(ii).

applications are dismissed.⁷ In other words, the second step of the process only occurs if a renewal expectancy is not awarded to the incumbent operator.⁸ To avoid uncertainty during the renewal process, the Commission stayed the effectiveness of these rules “until th[e] Order is final and no longer subject to judicial review.”⁹ The stay was eliminated on June 13, 1994,¹⁰ after the only appeal was voluntarily dismissed.

Shortly after commencement of the cellular proceeding, the Commission released an *NPRM* proposing the establishment of the new Personal Communications Service.¹¹ The Commission proposed various methods for awarding initial licenses, but indicated that if it opted for competitive bidding, licenses could be renewed using the cellular renewal procedures and expectancy.¹² In this regard, the Commission proposed to award PCS licenses for “a 10-year license term with a renewal expectancy similar to the one applied to cellular telephone licenses.”¹³ The Commission indicated that unless cellular licensees received a high probability of renewal for operating in substantial compliance with FCC rules, “investors would be reluctant to make investments in equipment, training and marketing specific to a particular PCS system.”¹⁴

⁷47 C.F.R. § 22.935(c).

⁸47 C.F.R. §§ 22.935(c); 22.940(b).

⁹*Cellular Renewal MO&O*, 8 F.C.C.R. at 2836.

¹⁰*See Further Reconsideration*, 9 F.C.C.R. at 4487 n.1, 4490.

¹¹*Amendment of the Commission’s Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Notice of Proposed Rulemaking and Tentative Decision*, 7 F.C.C.R. 5676 (1992) (“*PCS NPRM*”).

¹²*Id.* at 5769. The Commission ultimately decided to award PCS licenses pursuant to competitive bidding. *Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, PP Docket No. 93-253, *Fifth Report and Order*, 9 F.C.C.R. 5532 (1994).

¹³*PCS NPRM*, 7 F.C.C.R. at 5707.

¹⁴*Id.* at 5707-08. Around the same period, Congress amended the Communications Act to require “regulatory parity” for similar commercial mobile radio services. *See Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, Title VI, Sec. 6002(b)(2)(A), 6002(b)(2)(B), 107 Stat. 312, 392 (1993), which substantially amended Section 332 of the Communications Act.

In September 1993, the FCC established renewal and other rules for the new PCS service.¹⁵ According to the Commission:

We continue to believe that our proposed license term and a significant renewal expectancy are appropriate for the PCS service. This relatively long period and high renewal expectancy will provide a stable environment that is conducive to investment, and thereby will foster the rapid development of PCS. Accordingly, we are adopting the 10-year license term for PCS and *provisions regarding renewal expectancy that currently apply to the cellular service*.¹⁰¹

¹⁰¹ We recognize that we stayed in part, on our own motion, the cellular renewal expectancy rules pending judicial review. If those rules are reversed in court, we will have time to adopt new renewal expectancy rules for PCS before the 10-year license term expires.¹⁶

As indicated above, the Commission specifically referenced the cellular renewal rules, as reconsidered, as the basis for the PCS renewal rules. The Commission also indicated that if the cellular rules were overturned, it would need to adopt new PCS rules.

In implementing the statute, the Commission concluded that this Congressional mandate requires symmetrical regulation of PCS and cellular services. *See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act — Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1418 (1994); *Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications*, GN Docket No. 94-90, *Report and Order*, 10 F.C.C.R. 6280, 6290, 6300 (1995); *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act — Competitive Bidding*, WT Docket No. 96-18; PR Docket No. 93-253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 F.C.C.R. 10030, 10036 (1999). As a result, the Commission has consistently imposed similar regulations on these two services. *See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services*, GEN Docket No. 90-314, *Second Report and Order*, 8 F.C.C.R. 7700, 7715, 7725, 7727, 7742-47, 7764 & n.120 (1993) (“*Second Report*”); *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162, *Report and Order*, 12 F.C.C.R. 15668 (1997) (“*PCS Remand Order*”) (extending LEC separation requirements to PCS).

¹⁵*Second Report*, 8 F.C.C.R. at 7753.

¹⁶*Id.* at 7753 (emphasis added).

Nevertheless, the PCS renewal rules the Commission adopted do not match-up with what was apparently intended. The Commission only adopted a single PCS renewal rule — Section 24.16.¹⁷ This rule merely contains a discussion of the criteria for a renewal expectancy and its relative importance in a comparative proceeding. The rule does not discuss the procedures to be used if a renewal application is challenged or the basic qualifications and filing requirements for competing applicants. Thus, the cellular and PCS rules are not symmetrical¹⁸ and action needs to be taken to clarify this matter well before PCS renewal applications are due and competing applications are filed.

DISCUSSION

THE PCS RENEWAL RULE MUST BE MODIFIED TO CONFORM TO THE CELLULAR RENEWAL RULES

At present, the cellular renewal rules address the entire renewal process — from the contents of renewal applications to the two-step process to be followed if competing applications are filed. The two-step process is explained in detail with the first-step involving whether a renewal expectancy should be awarded. In contrast, there is only a single PCS renewal rule that addresses little more than the criteria for a renewal expectancy. The following chart graphically depicts the problem:

¹⁷Section 24.16 provides:

A renewal applicant involved in a comparative renewal proceeding shall receive a preference, commonly referred to as a renewal expectancy, which is the most important comparative factor to be considered in the proceeding, if its past record for the relevant license period demonstrates that the renewal applicant:

(a) Has provided "substantial" service during its past license term. "Substantial" service is defined as service which is sound, favorable, and substantially above a level of mediocre service which might just minimally warrant renewal; and

(b) Has substantially complied with applicable Commission rules, policies and the Communications Act.

47 C.F.R. § 24.16.

¹⁸*Compare* 47 C.F.R. § 24.16 *with* 47 C.F.R. §§ 22.935-22.940.

	CELLULAR	PCS
License Term	Section 1.955(a)(1)	Section 1.955(a)(1) Section 24.15
Renewal Expectancy	Section 22.940	Section 24.16
Components of a Renewal Expectancy Exhibit	Section 22.940	None
Comparative Hearing Procedures	Section 22.935	None
Competing Applications	Section 22.940 Section 22.937(g) Section 22.939	None
Procedures Governing Dismissal of Renewal Applications	Section 22.936	None

The asymmetry reflected above was neither intended nor is it logical given the similarity of the two services. A rulemaking should thus be started to square the PCS renewal rules with the cellular rules. Otherwise, the PCS renewal rule may be deemed defective or the Commission may be required to conduct full comparative hearings whenever competing applications are filed.¹⁹

In the *Second Report* setting forth the rules for PCS, the Commission indicated that it wanted the cellular and PCS renewal rules to be symmetrical.²⁰ Apparently, because the cellular rules were stayed pending appeal, the Commission only adopted one portion of the cellular renewal rules and failed to extend the entire cellular renewal program to PCS. CTIA requests that this oversight be corrected by replacing the text of Section 24.16 with the following:

The PCS renewal process shall be governed by the cellular renewal rules set forth in Sections 22.935 through 22.940.

Amending the rules in this fashion will obviously square the renewal rules for both services.²¹ This approach will ensure (i) that renewal expectancies for both services are awarded based on

¹⁹See *McElroy Electronics Corp. v. FCC*, 86 F.3d 248 (D.C. Cir. 1996); *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551 (D.C. Cir. 1987).

²⁰*Second Report*, 8 F.C.C.R. at 7753.

²¹See *PCS NPRM*, 7 F.C.C.R. at 5769; *Second Report*, 8 F.C.C.R. at 7753.

the same criteria, and (ii) that, like cellular licensees, PCS licensees will be subject to the two-step hearing process when competing applications are filed.

To avoid uncertainty with regard to the PCS renewal process, the procedures and filing requirements need to be clarified so that licensees, after making substantial investments during their license term, are not unnecessarily caught up in a regulatory quagmire if competing applications are filed.²² Congress amended the Communications Act in 1996 to eliminate this uncertainty for broadcast licensees.²³ It directed the FCC to grant broadcast renewal applications, and prohibit comparative hearings, where the incumbent licensee is found deserving of a renewal expectancy. If competing applications do not need to be entertained with respect to broadcast renewals, there should be no legal impediment to using the cellular two-step renewal process for PCS. Accordingly, the Commission should initiate a rulemaking to extend the cellular renewal rules to PCS.

Finally, the Commission “has consistently found that section 332 of the Act requires that similar types of mobile service, such as broadband PCS and cellular, be regulated similarly.”²⁴ The FCC and the courts also have made clear that they view cellular and PCS as essentially

²²Compare this situation with broadcast comparative hearing cases after *Bechtel v. FCC*, 10 F.3d 875, 878 (D.C. Cir. 1993). In these cases, there are no clear criteria for comparing applicants. See *Reading Broadcasting, Inc.*, 14 F.C.C.R. 7176 (Video Serv. Div. 1999).

²³See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); H.R. Conf. Rep. No. 104-458, at 164 (1996).

²⁴*Application by BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act to Provide In-Region InterLATA Services In Louisiana*, CC Docket No. 97-231, *Memorandum Opinion and Order*, 13 F.C.C.R. 6245, 6290 n. 259 (1998); see, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1413 (1994); *Implementation of Sections 3(n) and 332 of the Communications Act*, GN Docket No. 93-252, *Third Report and Order*, 9 F.C.C.R. 7988, 7992, 7994 (1994); *PCS Remand Order*, 12 F.C.C.R. at 15691-92; *Eligibility for the Specialized Mobile Radio Services*, GN Docket No. 94-90, *Report and Order*, 10 F.C.C.R. 6280, 6290, 6300 (1995).

fungible.²⁵ Therefore, subjecting cellular and PCS licensees to different renewal rules is contrary to the FCC's announced policy of like treatment of like wireless services.

The inconsistency between the cellular and PCS renewal rules appears to be an inadvertent oversight. The Commission has proffered no reasons for treating cellular and PCS licensees differently at renewal, while suggesting repeatedly that they should be treated alike.²⁶ Thus, the FCC bears a heavy burden if it intends to subject PCS and cellular licensees to different renewal procedures. Accordingly, the FCC should initiate a rulemaking to square the PCS renewal rules with those applicable to the cellular service.

²⁵*Second Report*, 8 F.C.C.R. at 7715, 7725, 7727, 7742-47, 7764 & n.120; see *Cincinnati Bell Telephone v. FCC*, 69 F.3d 752 (6th Cir. 1995).


²⁶See, e.g., *Second Report*, 8 F.C.C.R. at 7715, 7725, 7727, 7742-47, 7764 & n.120; *PCS Remand Order*, 12 F.C.C.R. at 15691-92. Indeed, the FCC's only attempt to subject PCS and cellular service to disparate regulation was struck down. *Cincinnati Bell*, 69 F.3d 752.

CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission initiate a rulemaking proposing to amend Section 24.16 in a manner that makes clear that the PCS renewal process will be governed by the cellular renewal rules set forth in Sections 22.935 through 22.940.

Respectfully submitted,

**CELLULAR TELECOMMUNICATIONS
INDUSTRY ASSOCIATION**

A handwritten signature in black ink, reading "Michael Altschul". The signature is fluid and cursive, with the first name "Michael" and last name "Altschul" clearly distinguishable.

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